Supreme Court, U.S.
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No. 93-1893

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

C. I. STROUD, Individually,

Petitioner,

v.

DEBORAH SHAW, Administratrix of the Estate of Sidney Bowen, Deceased, and NANCY BOWEN, Individually and as guardian ad litem for KIMBERLY YVONNE BOWEN and LEE FREDERICK BOWEN, the minor children of Sidney Bowen,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. WHERE A SUPERVISOR APPROVED, CONDONED, LAUGHED AND JOKED ABOUT A TROOPER'S REPEATED USE OF EXCESSIVE FORCE ON ARRESTEES OVER A PERIOD OF FIVE YEARS, WAS IT REASONABLY FORESEEABLE THAT THE TROOPER WOULD CONTINUE TO USE EXCESSIVE FORCE AFTER THE SUPERVISOR WAS TRANSFERRED?

LIST OF PARTIES

Petitioner C. I. Stroud, a Sergeant in the North Carolina Highway Patrol.

Respondents, Deborah Shaw, Administratix of the Estate of Sidney Bowen, Deceased, Nancy Bowen, individually and as guardian at litem for Kimberly Bowen and Lee Frederick Bowen, children of Sidney Bowen.*

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*Petitioner named Nancy Bowen and her children, Kimberly Bowen and Lee Frederick Bowen, as respondents. They are not properly before the Court on any claims against Petitioner Stroud. They are, however, properly before the Court in a contemporaneously filed Cross-Petition in this case. Nonetheless, we will refer to Respondents in the plural in this Brief.

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OPINION BELOW

The Fourth Circuit's opinion in this case is *Shaw v. Stroud,* 13 F.3d 791 (4th Cir. 1994), and is reproduced in the appendix to the Petition for Certiorari filed herein.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. U.S. Const. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

2. 42 U.S.C. §1983 (set out in Petition for Writ of Certiorari at App. 73).

STATEMENT OF THE CASE

Petitioner's statement of the procedural history of the case is correct and will not be repeated here, but his representation of the facts contains sufficient inaccuracies and misleading statements to warrant a restatement of the facts. We state the facts in the light most favorable to the respondent because the issues arise upon a consideration of summary judgment.

On February 27, 1990, as Sidney Bowen pulled into his driveway, he was accosted by officer Alfred Morris, a State Trooper, who suspected him of driving while impaired. At Morris' request, Bowen displayed his driver's license and seated himself in the patrol car. Shortly afterwards, Bowen, unarmed, ran from the car with Morris in close pursuit, wielding his flashlight.

During the brief chase, Bowen's stroke-stricken wife, Nancy, and thirteen year old daughter, Kim, heard him say, "Kim, go get help. The law is trying to kill me in my own front yard." "Okay, okay, I'll go anywhere

you want me to go." "Nancy, I'm going to jail." (J.A. 403, 1038-1044).[1] Morris brought Bowen to the front of the house and stood near the patrol car with him. Bowen jerked his hand away from Morris. Morris then beat Bowen to the ground with his flashlight, as Bowen tried to protect himself from the blows of the flashlight. (J.A. 404).

Morris shot Bowen several times, until Bowen fell, killing him on the spot, while Bowen's wife looked on, helplessly. (J.A. 404-05).

Just nine months before Morris killed Bowen, Judge Eugene Gore, a state court district judge familiar with Morris' violent propensities, accurately predicted in a complaint against Morris that it was "only a matter of time before Trooper Morris seriously injures a person." Judge Gore stated that he had seen case after case where Morris had used excessive force, usually on black people or those of lower means. (J.A. 447). Judge Gore's assessment of Morris was borne out by Morris' history as a patrolman. Morris' violent tendencies and conduct were not only known to Judge Gore, but to Morris' supervisors, petitioner C. I. Stroud, and Sergeant J. M. Smith.

During the five years, 1983-1988, that Petitioner, C.I. Stroud supervised Morris, he received reports about Morris' use of excessive force and his rude manner with the public. In May, 1987, Harvey Paul Walker, who had been beaten by Morris, told Stroud that he wanted to talk with him about the way Morris mistreated him. Stroud shrugged it off, saying, "Oh, he roughed you up," and never followed it up. (J.A. 361). In the same month, Stroud was informed that Morris had called an

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[1] "J.A." refers to the Joint Appendix filed in the Fourth Circuit Court of Appeals.

arrestee, Thomas Mensor, a "nigger." No action was taken against Morris. Instead, Morris was cleared. (J.A. 509-11, 811-18, 842-48). When another Morris arrestee, Gary Ward, complained of Morris' violence to Stroud in July, 1987, Stroud just "sort of smiled at him." (J.A. 389-90). Incidents of Morris' rudeness occurring in September and December of 1987, and in February and May of 1988, were brought to Stroud's attention. (J.A. 501-05, 762-65).

When Jesse James, arrestee, tried to complain to Stroud about being assaulted by Morris in March, 1988, Stroud refused to listen to him, but laughed in his face and said to Morris, "You got another one." (J.A. 924-27). In July, 1988, John Cothron, an arrestee, complained that he suffered two five-inch cuts on the head, was beaten in the face and was struck in the ribs during an arrest by Morris and another trooper. Stroud instructed a subordinate to conduct an investigation in which Morris was completely exonerated. (J.A. 465).

During Stroud's tenure from September, 1987, to December, 1988, six of the nine charges of assault on a law enforcement officer in Columbus County, North Carolina were brought by Morris. There were forty-six charges for resisting arrest, twenty of which were initiated by Morris. From 1984 to 1990, thirteen people arrested by Morris alleged that he used excessive force.

Stroud was transferred from Troop B-V and replaced by First Sergeant J. M. Smith in December, 1988. Stroud did not inform Smith about Morris' history of complaints of using excessive force.

Morris' abusive behavior continued under Smith. In March, 1989, Chief Roscoe Jacobs, a fire chief, complained to Smith about Morris' rudeness at an accident scene. In May, 1989, Smith was told that District Court Judge Gore had complained that over the past eighteen

months he had seen case after case involving the use of excessive force by Morris on arrestees, particularly "blacks or people of lower menas." (J.A. 447). It was at this time that the Judge made the prophetic comment that it was just a matter of time before Morris seriously injured some one. Only a week after Judge Gore's complaint, a local lawyer complained of Morris using excessive force on his client. Smith's only response was to have a line sergeant attend the criminal trial where the judge would not allow any evidence of excessive force. (J.A. 333-48, 694-703).

Just three weeks before Sidney Bowen was killed, Smith met Morris at the hospital where a Morris arrestee, Rudolph Towns, was admitted for treatment of injuries inflicted by Morris (Supplemental Appendix 12).

Court records show that Trooper Morris had a disproportionately high number of arrests for the charges of assault on a law enforcement officer and resist/delay/obstruct an officer in the years immediately before the incident involving Sidney Bowen. During the two and a half years prior to February 27, 1990, the twenty troopers in Troop B-V brought a total of eighty-eight charges in Columbus County for assault on a law enforcement officer and resisting arrest. (J.A. at 439-41). Trooper Morris initiated thirty-nine of these eighty-eight cases. Thus, over 44% of all cases for these two charges in Columbus County were brought by Trooper Morris.

From September, 1987, to December, 1988, a time in which Stroud was First Sergeant, nine charges for assault on a law enforcement officer were lodged in Columbus County by state troopers. Of these, six were initiated by Trooper Morris. Over the same period, there were forty-six charges for resisting arrest, twenty of which were initiated by Morris. (J.A. at 439-41).

When Smith was First Sergeant, from January, 1989, through March, 1990, there were six charges for assault on an officer in Columbus County, two of which were brought by Trooper Morris. In the same period there were twenty seven charges for resisting arrest, eleven of which were brought by Trooper Morris. (J.A. at 439-41). Trooper Morris clearly had a significantly greater number of charges for these offenses during this time. Indeed, a number of troopers were able to carry out their duties without ever filing these charges.

This disproportionately high number of tickets for assault and resisting charges is not explained by Morris working more hours, or writing more citations generally. Highway patrol records for Troop B-V in 1988 and 1989 show that Trooper Morris's total hours worked for 1988 and 1989 were actually less than several other troopers and consistent with the number of hours worked by most of the troopers. (J.A. at 451, 455). Similarly, the number of traffic tickets Morris wrote overall was not significantly out of line with anyone else. (J.A. at 454, 458). Finally, Trooper Morris's higher number of assault and resisting charges is not explained by the areas where he patrolled. All of the troopers in Troop B-V worked the difficult areas. (J.A. at 718).

Sergeant Stroud states that he does look at the number of assault charges and resisting arrest charges that a patrolman makes to see if there is a pattern, and that if there is a pattern, it indicates that a supervisor probably needs to keep a closer eye on that patrolman. However, in spite of the complaints he received, he never reviewed the assault and resisting charges that Trooper Morris was making. (J.A. at 784-86).

Trooper Morris claims that in accordance with patrol policy, he told a supervisor each time he used such force in the course of making an arrest that the arrestee was injured and required medical treatment. (J.A. at 822-29, 263). Usually, the supervisor would meet Morris at the hospital. He made his First Sergeants aware of roughly a dozen incidents where he had struggles with people. (J.A. at 829). However, Highway Patrol policy also requires that a trooper make a written report of any incident in which force is used. (J.A. at 397). The report is reviewed by the Line Sergeant and the First Sergeant. (J.A. at 398). Morris did not comply with this policy and his supervisors, who knew of the incidents from their hospital visits, took no action to see that the policy was enforced.

Additionally, the supervisors knew that Morris was claiming that large numbers of citizens were assaulting him. Between April, 1987, and February, 1990, Morris completed Report of Assault forms relating to eight separate incidents where he claimed he was assaulted, including the incident where Mr. Menser had complained that Morris had called him a "nigger" and the incident giving rise to this lawsuit. (J.A. at 513-18).

In the face of this history and pattern of excessive force and rudeness, Morris was never disciplined by either Stroud or Smith during their respective periods of supervision. It was this set of facts which led the court below to conclude that Stroud's liability was a question for the jury.

Stroud's Petition for Certiorari seeks to overturn the Fourth Circuit opinion holding that the question of his liability is a question for the jury. We contend that the

opinion below is correct in this regard and certiorari should be denied. However, alternatively, we have filed a cross petition asking this Court to review the supervisory liability of Stroud's successor, Sergeant Smith, in the event Stroud's petition is granted. The majority and the dissent below agree that the facts support liability of at least one of the supervisors. If certiorari is granted, it will be necessary to consider the liability of both supervisors in order for this Court to make a full and fair determination of supervisory liability.

REASONS FOR DENYING THE WRIT

The decision below of the United States Court of Appeals for the Fourth Circuit, *Shaw v. Stroud,* 13 F.3d 791 (4th Cir. 1994), correctly held that a supervising state trooper was liable under 42 U.S.C. §1983 for deliberate indifference in failing to take any corrective action whatsoever when he knew of a pattern of violent behavior by his subordinate which was likely to cause and did cause injury and death. When he witnessed or was told of excessive force being applied by his subordinate, the supervisor would laugh and joke about it, often in the presence of his subordinate.

The Fourth Circuit decision followed the principles of supervisory liability established by this Court in *Rizzo v. Goode,* 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), and is consistent with the Fourth Circuit's own precedent in *Slakan v. Porter,* 737 F.2d 368 (4th Cir. 1984), *cert. denied,* 470 U.S. 1035, 105 S.Ct. 1413, 84 L.Ed.2d 796 (1985), *Avery v. County of Burke,* 660 F.2d 111 (4th Cir. 1981), *Orpiano v. Johnson,* 632 F.2d 1096 (4th Cir. 1980), *cert. denied,* 450 U.S. 929, 101 S.Ct. 1387, 67 L.Ed.2d (1981), *Withers v. Levine,*

615 F.2d 158 (4th Cir. 1980) and the various circuit court decisions applying *Rizzo*.

The decision below does not conflict with this Court's decision in *Martinez v. California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980) because it does not involve the state's liability for the actions of private citizens, remote in time and circumstance from state action.

The facts of this case are simple and straightforward, though extraordinary in the egregious and brutal conduct involved. The principles of law are well established and correctly decided. Moreover, this is a case that has not yet gone to trial. The court below simply decided on a motion for summary judgment that the case should be submitted to a jury to decide the issues of liability of a state trooper and one of his supervisors. There is no reason to grant certiorari on these facts, these issues, nor this procedural posture.

I.

BY IMPOSING SUPERVISORY LIABILITY UPON A SUPERVISOR WHO APPROVED, CONDONED, LAUGHED AND JOKED ABOUT A PATTERN OF VIOLENT CONDUCT OF AN OFFENDING SUBORDINATE, THE CIRCUIT COURT CORRECTLY APPLIED ESTABLISHED LEGAL PRINCIPLES TO AN APPROPRIATE FACTUAL SETTING.

Petitioner Stroud, who supervised trooper Alfred Morris for five years before Morris violently shot and killed Sidney Bowen, had personally witnessed Morris using excessive force on a number of occasions. On other occasions, victims of Morris' violence had complained or attempted to complain to Stroud about Morris' abuse. Stroud sometimes laughed in the face of the victim and

at other times joked about Morris' conduct. At no time did Stroud reprimand Morris or even speak disapprovingly about his conduct. Stroud also knew or reasonably should have known that Morris had a substantially disproportionately high number of charges of assault and resisting arrest against those persons whom he arrested compared to the other troopers in his unit. As noted by the Court of Appeals, ". . . the statistical evidence speaks for itself: during Stroud's tenure as first sergeant of Troop B-V (two line sergeants and twenty troopers), Morris instituted twenty-six of the fifty-five charges of assault on a law enforcement officer and resisting/delaying/obstructing an officer." *Shaw*, 13 F.3d at 800.

Stroud should have foreseen what a state district court judge, who only saw Morris in court, foresaw and complained about. Judge Eugene Gore, less than six months after Stroud was transferred, told a line sergeant that over the past eighteen months in his courtroom, trooper Morris had case after case involving the use of excessive force upon arrestees, particularly those who were Black or lower income. Judge Gore stated that it was just a matter of time before someone would be seriously injured as a result of Morris' conduct. The judge had seen the same pattern of conduct that Stroud had seen and been told about. Nine months after Judge Gore's complaint, Morris shot and killed an unarmed Sidney Bowen. The Court of Appeals recognized that under these circumstances, a reasonable jury could conclude that there was an affirmative causal link between Stroud's conduct and Bowen's death. *Rizzo v. Goode, supra; Slakan v. Porter, supra.*

Petitioner seeks to elevate the single fact of the passage of time in this case above all other facts and cir-

cumstances in an attempt to create a conflict between this case and this Court's decision in *Martinez v. California*, when in fact no conflict exists at all.

Martinez addressed the issue of remoteness in the context of the responsibility of the state to the survivors of a victim murdered by a parolee who had been released five months before and over whom the State had no control. *Martinez* turned on the relationship between the parolee and the State, rather than the lapse of time between the parolee's release and the commission of the crime. The Court noted:

> Although the decision to release Thomas was action by the State, the action of Thomas five months later cannot be fairly characterized as state action. . . . [The victim's] life was taken by the parolee five months after his release. He was in no sense an agent of the parole board. *Martinez*, 44 U.S. at 285-86, 62 L.Ed.2d at 489.

In the present case, Bowen's life was taken by an agent of the State, the same agent who had engaged in a continuing pattern of violent conduct which had gone unchecked and uncorrected by Stroud.

The majority opinion below specifically addressed the issue of the passage of time:

> Stroud contends that, because he transferred fifteen months before the Bowen incident, there is no affirmative causal link to the harm suffered by Bowen. We believe our discussion in *Slakan* forecloses Stroud's argument. In *Slakan*, we determined that the causal link in §1983 cases is analogous to proximate cause. In other words, Stroud is liable for the 'natural consequences of his actions.' . . . Notwithstanding the fifteen month gap, Bowen's death was a natural and foreseeable consequence of Stroud's failure to investigate, or even to address, the pervasive violent propensities of one of his

> officers. Because Stroud was aware of Morris' frequent use of excessive force, it follows that he knew that Morris' unchecked service on the force posed a constant and dangerous threat to the welfare of arrestees. 13 F.3d at 800.

Martinez did not purport to substitute an arbitrary and fixed time period for the traditional tort principle that lapse of time is only one of many factors to be considered by the jury on the issue of proximate cause.

The circuit court decisions relied upon by Petitioner all recognized that *Martinez* was not an attempt to establish a brightline time period after which causation could no longer be found, but rather provided an analysis of the State's responsibility for the actions of third party private citizens who are not state actors. In *Humann v. Wilson,* 696 F.2d 783 (10th Cir. 1983), a case involving a rape committed by a parolee within two months after his release, the court observed in finding state action too remote: "The remoteness discussed in *Martinez* was not simply a matter of time." *Id.* at 784. That court noted that the parolee was not an agent of the State and did not have any special relationship with the victim. In *Fox v. Custis,* 712 F.2d 84 (4th Cir. 1983), a case involving injury by a parolee one month after his release and while he was still under the State's supervision, the court found the injury too remote because the State had no duty to protect members of the public from the actions of criminals in the absence of a special relationship creating such a duty: "The claimants here were simply members of the general public, living in the free society, and having no special custodial or other relationship with the state." *Id.* at 88. In *Janan v. Trammell,* 785 F.2d 557 (6th Cir. 1986), another case

finding remoteness in parolee inflicted injury less than two months after release, the court stated:

> Scruggs [the parolee] was not a state officer and could not be said to be acting under color of state law. . . . We do not believe that the Supreme Court intended to provide us with a due process time-table such that a five-month gap does not deprive one of due process rights while a two-month gap automatically does. . . . Rather, the proper analysis is whether a special relationship exists between the criminal and the victim or between the victim and the state or whether there is some showing that the victim, as distinguished from the public at large, faces a special danger by the parolee's release. *Id.* at 559-60.

The Ninth Circuit applied a similar analysis in finding injury inflicted by a prison escapee in less than three months after escape too remote for liability under §1983. *Ketchum v. Alameda County,* 811 F.2d 1243 (9th Cir. 1987). Addressing *Martinez,* the court reasoned: "In discussing remoteness, the [*Martinez*] Court considered not only the lapse of time, but also the fact that the decedent did not stand in any special relationship to parolee from which the state officers might have inferred a special danger to her, distinguishable from the danger the public at large faces from parolees." *Id.* at 1245.

No court has applied *Martinez* for the proposition claimed by the Petitioner. There is no need to grant certiorari to address a principle which is clear to all of the circuit courts, but not clear to the Petitioner.

II.
THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE STANDARD FOR SUPERVISORY LIABILITY.

Petitioner seems to concede that there is no conflict among the circuits on the standard for supervisory liability by stating: "The Circuit courts have adopted similar standards, but not identical, to that relied upon by the Fourth Circuit in determining supervisory liability." (Pet. for Cert. at 16). But at the same time, Petitioner asks for review of those standards, for reasons that are unclear. There is no reason for this Court to review the question of supervisory standards when the circuit courts are in general agreement on those standards.

In *Rizzo v. Goode, supra,* this Court set the general standard for supervisory liability, requiring an "affirmative link" between the acts of individual officers and the direct or tacit approval by their supervisors. The verbal formulations of this concept have not been identical among the circuits, but in practical terms the underlying concept is similar in virtually all of the circuits. *Hays v. Jefferson County, Ky.*, 668 F.2d 869 (6th Cir. 1982). *See Gaudreault v. Municipality of Salem, Mass.*, 923 F.2d 203 (1st Cir. 1990); *Meriwether v. Coughlin*, 879 F.2d 1037 (2nd Cir. 1989); *Black v. Stephens*, 662 F.2d 181 (3rd Cir. 1981); *Slakan v. Porter, supra; Doe v. Taylor Independent School Dist.*, 15 F.3d 443 (5th Cir. 1994); *Fruit v. Norris*, 905 F.2d 1147 (8th Cir. 1990); *Howard v. Adkison*, 887 F.2d 134 (8th Cir. 1989); *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979); *Woodward v. City of Worland*, 977 F.2d 1392 (10th Cir. 1992); and *Fundiller v. City of Cooper City*, 777 F.2d 1436 (11th Cir. 1985).

The slight variations in the verbal formulation of the concept of supervisory liability have not prevented the circuit courts from achieving a remarkably uniform application of the doctrine. *Rizzo* has provided sufficient guidance for the circuit courts to enable them to apply a substantially uniform standard of supervisory liability. Contrary to Petitioner's assertion, the opinion below does not have any widespread impact upon supervisory officials because it does not change the standard. This case is just one example applying to a particular, albeit egregious, factual situation. Further review of that standard is neither necessary nor appropriate.

III.

PETITIONER STROUD'S APPROVAL AND ENCOURAGEMENT OF MORRIS' VIOLENT UNCONSTITUTIONAL CONDUCT COULD REASONABLY BE CONSIDERED A PROXIMATE CAUSE OF SIDNEY BOWEN'S DEATH, NOTWITHSTANDING STROUD'S TRANSFER BEFORE THE ULTIMATE EVENT.

Even though the Fourth Circuit did not hold Stroud's successor, Smith, liable under §1983, the court recognized that Stroud's transfer and Smith's supervision of Morris did not insulate Stroud from liability. The majority opinion below recognized that Smith "arguably exhibit[ed] deliberate indifference," but found that he was entitled to qualified immunity because he followed "standard operating procedures." 13 F.3d at 802-03. The dissenter even felt that Smith himself was deliberately indifferent and was liable for Sidney Bowen's death. *Id.* at 806. It is therefore clear that Smith's supervision of Morris left much to be desired. No matter how Smith's supervision is viewed, it cannot be said to be corrective or curative of the pattern of violent, uncon-

stitutional conduct which Morris established with Stroud's approval and encouragement during Stroud's tenure.

The question of intervening cause is, at base, a question of proximate causation which must be viewed against the traditional tort background of foreseeability. *Rieser v. District of Columbia,* 563 F.2d 462 (D.C. Cir. 1977). "If a negligent, intentional or even criminal intervening act or end result was reasonably foreseeable to the original actor, his liability would not ordinarily be superseded by that intervening act. In such circumstances, the two acts are usually concurrent causes of the injury." *Id.* at 479-80. Proximate cause, including intervening cause, is ordinarily a question of fact for the jury. *Id.* at 480.

Petitioners' request of this Court to determine whether Stroud's transfer and Smith's intervening supervision absolve Stroud of liability is simply a thinly-veiled attempt to have this Court resolve a question of proximate causation which is normally left to the jury.

The fact that Stroud was not supervising Morris on the date that Morris shot and killed Bowen is not dispositive of Stroud's liability. In *Haynesworth v. Miller,* 820 F.2d 1245 (D.C. Cir. 1987), the D.C. Circuit dismissed one chief of police who took office "as the events in question drew to a close," and because the plaintiff did not "allege any failing on his part." *Id.* at 1259, but held that his predecessor could be held liable under supervisory liability if he breached his duty to supervise and proximately caused the plaintiff's injury. *Id.* at 1259-60. In *Martinez Correa v. Lopez Feliciano,* 759 F.Supp. 947 (D. Puerto Rico 1991), the court refused to grant the defendant's motion for summary judgment

on supervisory liability, although he was not responsible for supervising the offending officer on the date the injury occurred.

The fact that Stroud was not Morris' supervisor at the time Morris inflicted the fatal injury is a factor which the jury should consider in determining proximate cause, but is not by itself a reason to conclude that there can be no such causation. Stroud's claim that he had no control over Morris after Stroud's transfer has a hollow ring when considered against the fact that he only laughed and joked about Morris' violence before the transfer. Even so, he still could have asked for an investigation into Morris' conduct at any time after the transfer, but he never did.

All of the judges who have considered this question, including the district court and the dissenting judge below, have agreed that there is supervisory liability in this case. The only question has been which supervisor is liable. All of the judges, except the dissenter, have agreed that Stroud is liable. The dissenting judge felt that Smith, rather than Stroud, is liable. Stroud seeks a result which would find neither supervisor liable. That would indeed be a miscarriage of justice. Certiorari should not be granted to determine the question of proximate cause in this case.

IV.

PETITIONER STROUD IS NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE STANDARDS FOR EXCESSIVE FORCE AND SUPERVISORY LIABILITY WERE CLEARLY ESTABLISHED AT THE TIME OF STROUD'S TENURE.

The court below correctly concluded that the Bowen Estate made the necessary showing to overcome Stroud's claim of qualified immunity. Stroud made a two-pronged claim for qualified immunity. He first claimed that the law of supervisory liability was not clearly established and, alternatively, he claimed that the law on excessive force was not clearly established. He was wrong on both counts. The law of supervisory immunity was clearly established in the Fourth Circuit by 1984 when *Slakan v. Porter, supra,* held that a supervisor who was deliberately indifferent in the face of a pervasive and unreasonable risk of harm could be held liable under §1983. It was, therefore, clearly established during Stroud's tenure as Morris' supervisor that Stroud could be held liable for Morris' conduct. Stroud's tenure stretched from 1983 until the end of November, 1988. Most of Morris' assaultive behavior occurred between May, 1987 and November, 1988. In May of 1987, Morris assaulted Walker and called Menser a "nigger." In July, 1987, Morris assaulted Ward. In March, 1988, Morris assaulted James and in July, 1988, Morris assaulted Cothren.

Tennessee v. Gardner, 471 U.S. 1 (1985), clearly established the principle that an arrestee had a constitutional right to be free from the use of excessive force by police officers making arrests. The Fourth Circuit had also decided *Bailey v. Turner,* 736 F.2d 963 (4th Cir. 1984) and *Justice v. Dennis,* 834 F.2d 380 (4th Cir. 1987), two cases which established that the use of

excessive force exceeded constitutional bounds. Morris engaged in a course of conduct where he severely beat several arrestees who were unarmed and who did him no harm.

No reasonable officer with the information that Stroud possessed could believe that his actions in winking, nodding, laughing and joking at complaints of severely excessive force could be lawful.

The facts of this case add nothing to the jurisprudence of qualified immunity. This was a situation where a police officer engaged in a pattern of egregious conduct in severely beating those whom he arrested. His supervisor knew about it, but took no action. Instead, he laughed and joked about it. There is nothing worthy of certiorari about this unique set of facts.

CONCLUSION

This case presents simple issues and well-established principles of supervisory liability, proximate cause and qualified immunity, all of which were decided in accordance with existing precedent. There are no conflicts among the circuits regarding any of the issues involved in this case.

For the foregoing reasons, respondents ask this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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June 30, 1994

CERTIFICATE OF SERVICE

I, James E. Ferguson, II, do swear or declare that on this date, the 30th day of June, 1994, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached Respondents' Brief In Opposition on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing in an envelope containing the above documents in the United States Mail properly addressed to each of them and with first-class postage prepaid.

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